

1 1. MALIK ALI MUHAMMAD, V-37398

2 2. CSP, CRC 402/27 LOW

3 3. P.O. Box 3535

4 4. NORCO, CA. 92860

5

6 6. PETITIONER, PRO SE

7

8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10

11

12 MALIK ALI MUHAMMAD

No. C 07-3627 MMC (PR)

13 PETITIONER,

14

PETITIONER'S APPLICATION

15

VS

FOR CERTIFICATE OF

16

APPEALABILITY FROM THE

17

DERRAL ADAMS, WARDEN

DISTRICT COURT AND STATE

18

RESPONDENT.

MENT OF REASONS IN SUPPORT

19

20 TO THE HONORABLE MARINE M. CHEENEY UNITED STATES

21 DISTRICT JUDGE, NORTHERN DISTRICT OF CALIFORNIA.

22

23 INTRODUCTION

24

25 PURSUANT TO 28 U.S.C. A § 2253, RULE 22(a)(1) FRAP, AND

26 NINTH CIR. RULE 22-1, PETITIONER MALIK ALI MUHAMMAD,

27 (HEREAFTER "PETITIONER"), HEREBY REQUEST THAT THE

28 UNITED STATES DISTRICT COURT ISSUE A CERTIFICATE OF APPEALABILITY,

1 (HEREINAFTER "COA"), PERMITTING PETITIONER TO APPEAL
 2 FROM THE JUDGMENT ENTERED BY THE HONORABLE
 3 MARINE M. CHESNEY, UNITED STATES DISTRICT JUDGE, ON
 4 JULY 23, 2008, DISMISSING WITH PREJUDICE THE PETITION
 5 FOR WRIT OF HABEAS CORPUS IN THE ABOVE-ENTITLED
 6 MATTER. CONCURRENTLY WITH THE APPLICATION FOR COA,
 7 PETITIONER HAS FILED A TIMELY NOTICE OF APPEAL.

8

9 ISSUES ON WHICH CERTIFICATE OF APPEALABILITY IS SOUGHT

10

11 Issue #1

12

13 WHETHER THE DISTRICT COURT ERRED IN GRANTING

14 RESPONDENT'S MOTION TO DISMISS PETITION AS UNTIMELY

15

16 Issue #2

17

18 WHETHER THE DISTRICT COURT ERRED IN FAILING TO

19 GRANT AN EVIDENTIARY HEARING IN REGARDS TO

20 PETITIONER'S CLAIM OF EQUITABLE TOLLING

21

22 Issue #3

23

24 WHETHER PETITIONER WAS DENIED THE FUNDAMENTAL

25 CONSTITUTIONAL RIGHT TO DUE PROCESS AND THE RIGHT

26 OF CONFRONTATION AND CROSS-EXAMINATION OF HIS ACCUSER

27

28

Issue #4

WHETHER PETITIONER WAS DENIED EQUAL PROTECTION OF
THE LAW AND HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Issue #5

WHETHER PETITIONER'S FUNDAMENTAL (CONSTITUTIONAL)
RIGHT TO FREEDOM OF SPEECH WAS VIOLATED.

Issue #6

WHETHER THE REVOCATION OF PETITIONER'S PROBATION
WAS BASED UPON AN UNCONSTITUTIONALLY VAGUE AND
AMBIGUOUS CONDITION OF PROBATION.

Issue #7

WHETHER THE REVOCATION OF PETITIONER'S PROBATION
WAS BASED UPON AN UNCONSTITUTIONALLY OVERLY BROAD
CONDITION OF PROBATION.

Issue #8

WHETHER THE REVOCATION OF PETITIONER'S PROBATION
VIOLATED THE DOCTRINE OF "SEPARATION OF POWERS."

1 Issue #9

2

3 WHETHER THE REVOCATION OF PETITIONER'S PROBATIONARY
4 STATUS EXCEEDED THE JURISDICTION OF THE REVOKING
5 COURT.

6

7

Issue #10

8

9 WHETHER THE REVOCATION OF PETITIONER'S PROBATION
10 CONSTITUTED AN IMPROPER OBSTRUCTION TO THE PROPER
11 ADMINISTRATION OF JUSTICE.

12

13

Issue #11

14

15 WHETHER THE PETITIONER WAS DENIED DUE PROCESS AND
16 EQUAL PROTECTION OF THE LAW AS A RESULT OF THE
17 INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

18

19

20 LEGAL STANDARD FOR ISSUANCE OF COA

21

22 IN THE UNITED STATES SUPREME COURT DECISION OF
23 MILLER-EL V. COCKRELL (2003) 537 U.S. 322, 123 S. CT. 1029, THE COURT
24 CLARIFIED THE STANDARDS FOR ISSUANCE OF A COA:

25

26 "... A PRISONER SEEKING A COA NEED ONLY DEMONSTRATE

27 A "SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTION

28 AL RIGHT." A PETITIONER SATISFIES THIS STANDARD BY

1 DEMONSTRATING THAT JURISTS OF REASON COULD DISAGREE
 2 WITH THE DISTRICT COURT'S RESOLUTION OF HIS CONSTITUTIONAL
 3 CLAIMS OR THAT JURISTS COULD CONCLUDE THAT
 4 THE ISSUES PRESENTED ARE ADEQUATE TO DESERVE ENCOURAGEMENT
 5 TO PROCEED FURTHER.
 6
 7 Id., 123 S. CT. AT 1034 CITING SLACK V. MCDANIEL, 529 U.S. 473, 484,
 8 REDUCED TO ITS ESSENTIALS, THE TEST IS MET WHERE THE
 9 PETITIONER MAKES A SHOWING THAT "THE PETITION SHOULD
 10 HAVE BEEN RESOLVED IN A DIFFERENT MANNER OR THAT
 11 THE ISSUES PRESENTED WERE "ADEQUATE TO DESERVE ENCOURAGEMENT
 12 TO PROCEED FURTHER." Id., AT 1039, CITING
 13 BAREFOOT V. ESTELLE 463 U.S. 880 (1983). FURTHERMORE, "WHEN
 14 THE DISTRICT COURT DENIES A HABEAS PETITION ON PROCEDURAL
 15 GROUNDS WITHOUT REACHING THE PRISONER'S UNDERLYING
 16 CONSTITUTIONAL CLAIM, A COA SHOULD ISSUE WHEN THE PRISONER SHOWS, AT LEAST THAT JURISTS OF
 17 REASON WOULD FIND IT DEBATABLE WHETHER THE PETITION STATES A
 18 VALID CLAIM OF A DENIAL OF A CONSTITUTIONAL RIGHT AND THAT
 19 JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE DISTRICT COURT
 20 WAS CORRECT IN ITS PROCEDURAL RULING." (SLACK, SUPRA). INDEED, A CLAIM
 21 CAN BE DEBATABLE EVEN THOUGH EVERY JURIST OF REASON MIGHT AGREE,
 22 AFTER THE COA HAS BEEN GRANTED AND THE CASE HAS RECEIVED FULL
 23 CONSIDERATION, THAT THE PETITION WILL NOT PREVAIL. (SLACK, SUPRA)
 24
 25
 26
 27
 28 FOR THE REASONS STATED ABOVE, THE ISSUES ON WHICH

1 PETITIONER SEEKS A COA ARE AT LEAST DEBATABLE AMONG
2 JURISTS OF REASON. HENCE, EVEN THOUGH THIS COURT'S
3 DECISION MIGHT ULTIMATELY BE AFFIRMED ON
4 APPEAL, PETITIONER IS ENTITLED TO A COA ON THE
5 ISSUES SET FORTH ABOVE.

6
7 STATEMENT OF REASONS FOR ISSUANCE OF COA

8
9 THE DISTRICT COURT ERRED IN DISMISSING
10 THE PETITION AS BEING UNTIMELY.

11
12 IN 2003, IN THE SUPERIOR COURT OF ALAMEDA COUNTY,
13 PETITIONER WAS CONVICTED OF STALKING AND MAKING
14 CRIMINAL THREATS. THE TRIAL COURT SUSPENDED THE
15 IMPOSITION OF SENTENCE AND PLACED PETITIONER ON
16 PROBATION FOR A PERIOD OF FIVE YEARS.

17 IN 2004, THE COURT REVOKED PETITIONER'S PROBATION AND
18 SENTENCED HIM TO STATE PRISON FOR A TERM OF 32 MONTHS.

19 IN 2003, PETITIONER APPEALED HIS CONVICTION; THE APPEAL
20 WAS DENIED BY THE CALIFORNIA COURT OF APPEAL ON
21 FEBRUARY 22, 2005, AND THE CALIFORNIA SUPREME COURT
22 DENIED REVIEW ON APRIL 27, 2005.

23 IN 2004, PETITIONER APPEALED THE REVOCATION OF HIS
24 PROBATION; THE APPEAL WAS DENIED BY THE COURT OF APPEAL
25 ON MARCH 29, 2005. ON APRIL 10, 2006, PETITIONER FILED
26 A HABEAS PETITION IN THE SUPERIOR COURT; THE PETITION WAS
27 DENIED THAT SAME DATE.

28 ON JUNE 20, 2006, PETITIONER FILED A HABEAS PETITION IN

1 THE COURT OF APPEALS THE PETITION WAS DENIED ON
 2 JUNE 22, 2006.
 3 ON OCTOBER 19, 2006, PETITIONER FILED A HABEAS
 4 PETITION IN THE CALIFORNIA SUPREME COURT. THE
 5 PETITION WAS DENIED ON APRIL 18, 2007. (IN RE DIXON)
 6 ON JULY 13, 2007, PETITIONER FILED THE INSTANT HABEAS
 7 PETITION (FEDERAL) WHICH RAISES CLAIMS CHALLENGING
 8 BOTH THE CONVICTION AND PROBATION REVOCATION.

9 10 DISCUSSION

11
 12 PETITIONER CONTENDS THAT THE DISTRICT COURT JUDGE
 13 ERRED BY SUMMARILY DISMISSING HIS PETITION AS BEING
 14 UNTIMELY DUE TO THE FOLLOWING:
 15
 16 THE FEDERAL RULES OF CRIMINAL PROCEDURE ARE NOT AND WERE NOT
 17 INTENDED TO BE, A RIGID CODE TO HAVE AN INFLEXIBLE
 18 MEANING IRRESPECTIVE OF THE CIRCUMSTANCES.
 19 FALLEN V. UNITED STATES 378 U.S. 139, 84 S. CT. 1689 (1964)
 20
 21 "HABEAS CORPUS AND CIVIL RIGHTS ACTIONS ARE OF FUNDA-
 22 MENTAL IMPORTANCE... IN OUR CONSTITUTIONAL SCHEME."
 23 BECAUSE THEY DIRECTLY PROTECT OUR MOST VALUED RIGHTS.
 24 BOUNDS V. SMITH 430 U.S. 817, 97 S. CT. 1491 (1977), CITING
 25 JOHNSON V. AVERY 393 U.S. at 405, 69 S. CT. at 740, AND
 26 WOLFF V. McDONNELL 418 U.S. at 579, 94 S. CT. at 2906.

1 THE EXHAUSTION REQUIREMENT IS "GROUND IN PRINCIPLES
 2 OF COMITY." IT IS "PRINCIPALLY DESIGNED TO PROTECT THE
 3 STATE COURTS' ROLE IN THE ENFORCEMENT OF FEDERAL LAW
 4 AND PREVENT DISRUPTION OF STATE JUDICIAL PROCEEDINGS."
 5 NINO V GALAZA 183 F.3d 1003 (9th Cir. 1999), CITING
 6 ROSE V LUNDY 455 U.S. 509, 516, 102 S.Ct. 1198 (1982).

7
 8 THE SITUATION OF PRISONERS SEEKING TO APPEAL WITHOUT
 9 THE AID OF COUNSEL IS UNIQUE IN THAT THE PRISONER;
 10 1) CANNOT TRAVEL TO COURT TO INSURE THE FILING OF
 11 NECESSARY PAPERS AND DOCUMENTS,
 12 2) CANNOT PLACE DOCUMENTS DIRECTLY INTO THE HANDS OF
 13 THE POSTAL SERVICE,
 14 3) CANNOT FOLLOW-UP WITH CALLS TO THE COURTHOUSE,
 15 4) DO NOT HAVE LAWYERS TO MONITOR THE PROGRESS OF
 16 THE CASE AND ARE,
 17 5) UNABLE TO LEAVE PRISON FOR ANY REASON.

18
 19 IN ITS DISMISSAL ORDER, IT WOULD APPEAR AS THOUGH
 20 THE DISTRICT COURT PLACED SIGNIFICANT EMPHASIS UPON
 21 THE DECISION RENDERED WITHIN THE CASE OF
 22 EVANS V CHAVIS, 546 U.S. 189, 126 S.Ct. 846 (2006). FOR
 23 MOST, IT MUST BE NOTED THAT THE PETITIONER, (CHAVIS), IN
 24 THAT MATTER, HAD NOT ONLY FILED A "SECOND ROUND"
 25 OF PETITIONS (APPROXIMATELY 2 YEARS SUBSEQUENTLY TO
 26 THE FIRST ROUND) AND THERE HAD ALSO BEEN A HISTORY
 27 OF UNEXPLAINED DELAYS BETWEEN THE FILINGS OF THE
 28 PETITIONS IN THE STATE COURT, THE DELAY AT ISSUE WAS IN

1 EXCESS OF SIX MONTHS. COMPARATIVELY, THE TOTAL TIME
2 INTERVAL THAT ELAPSED BETWEEN THE FILINGS OF
3 PETITIONER'S HABEAS PETITION IN THE SUPERIOR COURT
4 AND THE STATE SUPREME COURT DID NOT EXCEED SIX (6)
5 MONTHS. FURTHERMORE, THE DISTRICT COURT CONCEDES
6 THAT THE NINTH CIRCUIT "HAS NOT ADDRESSED THE
7 APPLICABILITY OF THE CHAVIS DECISION TO A PERIOD
8 OF LESS THAN TEN MONTHS" (5:28-6:2).

9 REGARDING THE CONCURRING OPINION OF CHAVIS,
10 WHEREIN UNITED STATES SUPREME COURT JUSTICE STEVENS
11 SETS FORTH THE PRESUMPTION THAT "UNEXPLAINED"
12 STATE COURT ORDERS THAT DENY HABEAS PETITIONS WITH
13 DELAYS IN FILINGS OF SIX (6) MONTHS OR LESS, (I.E.
14 PETITIONS SHOULD BE CONSIDERED TO HAVE BEEN
15 FILED IN A TIMELY MANNER); THE DISTRICT COURT
16 CORRECTLY ARTICULATES THAT THE CONCURRING
17 OPINION "DOES NOT CONSTITUTE THE HOLDING" OF THE
18 CASE. NEVERTHELESS, WHEN CONSIDERING THE PROPER
19 STANDARD APPLICABLE TO THE DECISION OF WHETHER
20 TO ISSUE A COA, IT IS CLEAR THAT THE DISTRICT
21 COURT WOULD AGREE THAT JUSTICE STEVENS IS, IN FACT,
22 A "JURIST OF REASON," AS TO PRESUME TO THE CON-
23 TRARY WOULD BE AN INDECOROUS INFERENCE OF THE
24 GREATEST MAGNITUDE.

25 THE DISTRICT COURT WOULD ALSO APPEAR TO RELY UPON
26 THE DECISION OF CULVER V DIRECTOR OF CORRECTIONS,
27 450 F. SUPP. 2d 1135 (2006), WHEREIN FILING DELAYS OF
28 97 AND 71 DAYS WERE DEEMED TO BE UNREASONABLE.

1 HOWEVER, THE DISTINCTIONS BETWEEN CULVER AND THE
 2 PETITION HEREIN ARE STARKLY APPARENT, E.G.,
 3 a) FOREMOST, THE PETITIONER IN THE FORMER MATTER
 4 WAS REPRESENTED BY COUNSEL DURING THE
 5 COURSE OF FILINGS AT ISSUE,

6 b) IN THE CULVER MATTER RESPONDENT'S MOTION TO
 7 DISMISS THE PETITION WAS UNOPPOSED,

8 c) IN CULVER THERE WAS A 448 DAY DELAY BETWEEN
 9 THE FILING OF THE PETITION IN THE STATE SUPREME
 10 COURT AND THE FILING OF SAME IN THE FEDERAL
 11 DISTRICT COURT,

12 d) THE STATE SUPREME COURT DENIED THE PETITION
 13 "WITHOUT COMMENT," WHEREAS THE COURT IN THE
 14 PRESENT MATTER CITED A PROCEDURAL DEFECT
 15 (IN RE DIXON), WITHIN ITS DENIAL ORDER.

16
 17 IN SUMMATION REGARDING THE ISSUE OF "STATUTORY
 18 TOLLING," PETITIONER SUBMITS THE FOLLOWING:

19
 20 1) ORDINARILY, UNDER 28 U.S.C. § 2244(d)(2), THE ONE
 21 YEAR LIMITATIONS PERIOD FOR FILING HABEAS
 22 PETITIONS CHALLENGING NON-CAPITAL STATE
 23 CONVICTIONS IS TOLLED FROM THE TIME A CALIFORNIA
 24 PRISONER FILES HIS FIRST STATE HABEAS PETITION
 25 UNTIL THE DATE THE STATE SUPREME COURT RETELS
 26 HIS FINAL COLLATERAL CHALLENGE.

27
 28 2) IN THE NINTH CIRCUIT CASE OF SAFFOLD v. CARL 312 F.3d 1031

1 (9TH CIR. 2003), THE COURT PRESUMED THAT THE CALIFORNIA
 2 SUPREME COURT PETITION WAS NOT UNTIMELY BECAUSE IT
 3 WAS NOT EXPRESSLY DENIED AS SUCH BY THE CALIFORNIA
 4 SUPREME COURT (7.15.16).

5
 6 3) THE CALIFORNIA SUPREME COURT DID NOT EXPRESSLY
 7 DENY PETITIONER'S HABEAS PETITION ON THE BASIS
 8 OF UNTIMELINESS (5.7-8).

9
 10 4) THE "REALITY" IS THAT THE CALIFORNIA SUPREME
 11 COURT GAVE NO INDICATION WHATSOEVER THAT IT
 12 CONSIDERED THE FILING OF PETITIONER'S HABEAS
 13 PETITION "UNTIMELY".

14
 15 IT WOULD THEREFORE APPEAR THAT AT THE VERY
 16 LEAST JURISTS OF REASON WOULD FIND THE ISSUE OF
 17 THE "TIMELINESS" OF THE FILING OF PETITIONER'S
 18 HABEAS PETITION DEBATABLE AND AS A RESULT
 19 THEREOF THE ISSUANCE OF A CDA THE PROPER
 20 COURSE OF ACTION.

21
 22
 23 THE DISTRICT COURT ERRED BY DENYING PETITIONER'S
 24 CLAIM OF EQUITABLE TOLLING.

25
 26 IN RULING THAT PETITIONER IS NOT ENTITLED TO THE
 27 BENEFIT OF EQUITABLE TOLLING THE DISTRICT COURT
 28 ASSERTS THAT "THE RECORD IS INADEQUATE TO ESTABLISH

1 PETITIONER IS ENTITLED TO SUCH TOLLING (11.16-17) AND
 2 PETITIONER HAS NOT SHOWN HE WAS PREVENTED FROM
 3 FILING A TIMELY PETITION IN STATE COURT, EITHER
 4 BECAUSE OF HIS STATUS AS AN EMPLOYED PRISON PRISONER
 5 OR THE AD HOC PRISON POLICY LIMITING THE NUMBER
 6 OF COPIES A PRISONER CAN OBTAIN (11.28-12.1). THE COURT
 7 CONTINUES ITS ANALYSIS BY STATING THAT NEITHER
 8 CIRCUMSTANCE CONSTITUTES AN EXTRAORDINARY CIRCUM-
 9 STANCE BEYOND PETITIONER'S CONTROL THAT MADE IT
 10 "IMPOSSIBLE" FOR HIM TO FILE HIS PETITION ON TIME.
 11 UNFORTUNATELY, HOWEVER, THE DISTRICT COURT HAS
 12 SURROGATED THE APPLICABLE LEGAL STANDARD FOR THE
 13 IMPLEMENTATION OF EQUITABLE TOLLING, I.E., "EX-
 14 TERNAL IMPEDIMENT" WITH THE INAPPLICABLE TERM
 15 "IMPOSSIBLE."
 16 SECONDLY, THE DISTRICT COURT HAS IGNORED A
 17 PLETHORA OF APPELLATE DECISIONS WHEREBY CASES
 18 HAVE BEEN REMANDED TO DISTRICT COURTS WITH
 19 ACCOMPANYING INSTRUCTIONS TO CONVEY EVIDENTIARY
 20 HEARINGS FOR PURPOSES OF CLARIFICATION OF CLAIMS
 21 REGARDING EQUITABLE TOLLING.
 22 WHALEN-HUNT V EARLY 233 F.3d 1146 (2000)
 23 WILLIAMS V WOODFORD 384 F.3d 567 (9TH CIR. 2004)
 24 STANKOWITZ V WOODFORD 365 F.3d 406 (9TH CIR. 2004)
 25 INSYKIENGMAY V MORGAN 403 F.3d 657 (9TH CIR. 2005)
 26 ADDITIONALLY, GIVEN THE GRAVITY OF THE
 27 CONSTITUTIONAL DEPRIVATIONS AS DESCRIBED WITHIN
 28 THE PRESENT PETITION, IN RE ROBBINS 18 CAL 4TH 770 (1998)

1 IT IS EXTREMELY DIFFICULT TO COMPREHEND THE RATIONALE
 2 FOR THE REFUSAL BY THE COURT TO CONVEY AN EVIDENTIARY
 3 HEARING AS MANDATED BY THE PREDOMINANT WEIGHT
 4 OF LEGAL AUTHORITY THAT HAS CONSIDERED THIS
 5 ISSUE.

6 NEVERTHELESS, PETITIONER CONTENDS THAT HE IS
 7 ENTITLED TO AN EVIDENTIARY HEARING REGARDING
 8 HIS CLAIM OF EQUITABLE TOLLING AND THEREFORE
 9 RESPECTFULLY REQUEST THAT A COA BE ISSUED TO
 10 FACILITATE THE PROPER APPELLATE REVIEW OF THE
 11 ISSUE.

12
 13 PETITIONER WAS DENIED DUE PROCESS OF LAW AND THE
 14 FUNDAMENTAL RIGHT TO CONFRONT AND CROSS-EXAMINE
 15 WITNESSES INCLUDING, BUT NOT LIMITED TO THE COM-
 16 PLAINING WITNESS (V.S. CONSTITUTION 5TH AND 6TH AMEND.)

17
 18 ON MULTIPLE OCCASIONS DURING THE "CRITICAL STAGES"
 19 OF THE CRIMINAL PROSECUTION OF PETITIONER, COUNTY
 20 OF ALAMEDA, SUPERIOR COURT JUDGE, JON TROLESON, ISSUED
 21 ORDERS THAT FORBODE PETITIONER FROM CONTACTING THE
 22 EMPLOYER, (CITIBANK INC.), OF THE COMPLAINING WITNESS.
 23 IT MAY BE NOTED THAT ON THE DATES THAT SUCH ORDERS WERE
 24 ISSUED, PETITIONER WAS REPRESENTING HIMSELF, (IN PRO PER)
 25 HENCE WAS UNCONSTITUTIONALLY PRECLUDED FROM SEEKING
 26 MATERIAL EVIDENCE TO IMPERCH THE CREDIBILITY OF THE
 27 COMPLAINING WITNESS AS WELL AS OTHER WITNESSES THAT
 28 WERE PRESENTED BY THE PROSECUTION, (I.E. CITIBANK EMPLOYEES).

1 IT IS FURTHER NOTED THAT THE AFOREMENTIONED COURT
 2 ORDER WAS INCLUSIVE TO THE EXTENT THAT COUNTY OF ALAMEDA
 3 CUSTODIAL OFFICIALS WERE ORDERED TO CONFISCATE POSTAGE
 4 STAMPS FROM PETITIONER'S PERSONAL PROPERTY AND THE
 5 PRECLUSION OF CONTACT WITH EMPLOYER OF THE COM-
 6 PLAINING WITNESS ALSO APPLIED TO THIRD PARTIES
 7 ACTING ON BEHALF OF PETITIONER, (INCLUDING ATTORNEYS).
 8 CLEARLY, THE RIGHT TO PRESENT AN ADEQUATE DEFENSE
 9 AGAINST CRIMINAL CHARGES IS A MATTER OF CONSTITUTIONAL
 10 SIGNIFICANCE AND WHEN THE RIGHT IS IMPROPERLY RE-
 11 STRICTED, THE IMPACT UPON A DEFENDANT'S FUNDAMENTAL
 12 RIGHT TO A FAIR TRIAL IS PROFOUND. FURTHERMORE, THE
 13 UNITED STATES SUPREME COURT HAS HELD THAT A FUNDA-
 14 MENTAL COMPONENT OF THE RIGHT TO DEFEND ONE'S SELF
 15 AGAINST CRIMINAL ALLEGATIONS IS THE RIGHT TO CON-
 16 FRONT AND CROSS-EXAMINE HIS/HER ACCUSER.
 17 GILES V CALIFORNIA (DOCKET NO. 07-6053) U.S. SUPREME COURT
 18 CRAWFORD V WASHINGTON 541 U.S. 36 (2004)
 19 DAVIS V WASHINGTON 547 U.S. 813 (2006)
 20 CHAMBERS V MISSISSIPPI 410 U.S. 284 (1973)
 21 AS IT IS INCONCEIVABLE THAT THE ABEVE-MENTIONED
 22 CONSTITUTIONAL DEPRIVATIONS CONSTITUTE "HARMLESS ERROR,"
 23 DELAWARE V VAN ARDSALL 475 U.S. 673 (1967),
 24 ABATTI V SUPERIOR COURT 112 C.A.4 39 (2003), PETITIONER
 25 WOULD PROFFER THAT THE GRAVITY OF SUCH, CLEARLY
 26 WARRANTS THE EXCUSE OF A "DEBATABLE" TECHNICALITY
 27 REGARDING THE TIMELY FILING OF THE PETITION.
 28 IN RE. ROBBINS 18 CAL.4 770, 770 P.2D 153 (1998).

1 THE PETITIONER WAS DENIED EQUAL PROTECTION OF THE
 2 LAW AND AS A RESULT WHEREOF HIS RIGHT TO A FAIR
 3 TRIAL. (U.S. CONSTITUTION 14TH & 6TH AMDS, RESPECTIVELY)

4
 5 AS INDICATED (SUPRA), THE PETITIONER WAS PRECLUDED
 6 FROM SEEKING MATERIAL WITNESSES AND/OR EVIDENCE
 7 THRU DIRECT OR INDIRECT MEANS THAT NECESSITATED
 8 THE CONTACTING OF THE EMPLOYER OF HIS ACCUSER,
 9 (I.E. CITITANK).

10 ADDITIONALLY, PETITIONER, ALTHOUGH INDIGENT, WAS
 11 DENIED THE ALLOCATION OF MONETARY FUNDS THAT WERE
 12 ESSENTIAL FOR THE PROCUREMENT OF EXPERT WITNESS
 13 SERVICES, (I.E. VOICE ANALYSIS), AND TESTIMONY. IT MAY
 14 BE NOTED THAT ALL EVENTS, AS DESCRIBED HEREIN, OCCURRED
 15 DURING THE PERIOD OF JANUARY 2003 THRU APRIL 2003
 16 AND THE CRIMINAL TRIAL OF DEFENDANT COMMENCED
 17 ON OR ABOUT APRIL 10, 2003.

18 PETITIONER WAS THEREFORE UNCONSTITUTIONALLY
 19 IMPAIRED IN HIS RIGHT TO PRESENT AN ADEQUATE DE-
 20 FENSE TO THE EXTENT THAT HIS CONVICTION MUST BE
 21 OVERTURNED. HOLMES V CAROLINA 547 U.S. 319 (2006);
 22 AKE V OKLAHOMA 470 U.S. 68, 105 S. CT. 1087 (1985).

23
 24 THE REVOCATION OF PETITIONER'S PROBATION
 25 VIOLATED HIS FUNDAMENTAL CONSTITUTIONAL
 26 RIGHT TO FREE SPEECH.

27
 28 "THE RIGHT TO SPEAK FREELY SHALL NOT BE ABRIDGED"

1 AND "EVERY PERSON MAY FREELY SPEAK, WRITE AND PUBLISH
2 HIS OR HER SENTIMENTS ON ALL SUBJECTS, BEING RESPON-
3 SIBLE FOR THE ABUSE OF THIS RIGHT, A LAW MAY NOT
4 RESTRAIN OR ABRIDGE LIBERTY OF SPEECH OR PRESS."
5 (U.S. CONSTITUTION, 1ST AMEND. AND CALIFORNIA CON-
6 STITUTION, ART. I § 2(a), RESPECTIVELY).
7 ON MAY 24, 2004, PETITIONER'S PROBATION WAS PERMA-
8 NENTLY REVOKED AND TERMINATED, (CASE NO 144082), BY
9 COUNTY OF ALAMEDA, SUPERIOR COURT JUDGE, KENNETH BURL
10 AS A CONSEQUENCE OF THE REVOCATION OF HIS PROBATION,
11 PETITIONER WAS SENTENCED TO SERVE A TERM OF
12 32 MONTHS IMPRISONMENT.
13 THE REVOCATION OF PETITIONER'S PROBATION WAS
14 PREDICATED UPON HIS FORWARDING OF LETTERS TO THE
15 EMPLOYER OF THE COMPLAINING WITNESS, (CITYGROUP INC),
16 WHEREIN HE ADVISED SAID EMPLOYER OF THE CRIMINAL
17 CONDUCT OF THE COMPLAINING WITNESS TO WHICH HE,
18 PETITIONER, WAS A PERCIPIENT WITNESS.
19 IT MUST BE NOTED THAT THE ABOVE REFERENCED LETTERS
20 CONTAINED NO OBSCENE NOR PROFANE LANGUAGE; NO
21 EXPLICIT NOR IMPLICIT THREATS TO INFLECT BODILY
22 HARM TO ANY PERSON(S); NO LANGUAGE LIKELY TO
23 PRODUCE A VIOLENT REACTION; NO MATERIAL THAT COULD
24 POSSIBLY BE CONSTRUED AS PRESENTING A THREAT TO
25 THE NATIONAL SECURITY NOR COMMUNITY AT LARGE.
26 TO THE CONTRARY, ALL LETTERS CONTAINED ADVISE-
27 MENTS THAT WERE OF BENEFIT TO SOCIETY AND
28 INVOLVED MATTERS OF PUBLIC INTEREST.

1 A CONDITION OF PROBATION THAT INVOLVES THE FUNDAMENTAL
 2 MENTAL RIGHT TO FREESPEECH, (INCLUDING THE
 3 DISSEMINATION OF WRITTEN MATERIAL), "MAY
 4 BURDEN NO MORE THAN IS NECESSARY TO SERVE
 5 AN IMPORTANT GOVERNMENTAL INTEREST."
 6 PEOPLE V ARVANITIS 17 C3 1052 (1972);
 7 PEOPLE V LOPEZ 66 C.A. 4 615 (1998).
 8 CLEARLY, THE DELIBERATE AND INTENTIONAL CON-
 9 CEALMENT OF CRIMINAL ACTIVITY, EVEN WHEN
 10 ACCOMPLISHED THROUGH THE GUISE OF "PREVENTING
 11 HARASSMENT", CANNOT BE CONSTRUED TO SERVE AN
 12 IMPORTANT GOVERNMENTAL INTEREST. TO THE CONTRARY,
 13 SUCH RESTRAINTS UPON A FUNDAMENTAL CONSTITUTIONAL
 14 GUARANTEE, (I.E. FREEDOM OF SPEECH), MAY ONLY
 15 IMPOSE A DETRIMENT TO SOCIETY,
 16 SMITH V SILVER 149 C.A. 3 400 (1983).

17
 18 THE REVOCATION OF PETITIONER'S PROBATION
 19 WAS BASED UPON AN UNCONSTITUTIONALLY
 20 VAGUE AND AMBIGUOUS TERM AND CON-
 21 DITION OF PROBATION.

22
 23 A PENAL STATUTE THAT FAILS TO DEFINE THE CRIMINAL
 24 OFFENSE THAT IS ITS SUBJECT MATTER WITH SUFFICIENT
 25 DEFINITIVENESS THAT ORDINARY PEOPLE CAN UNDER-
 26 STAND THE CONDUCT THAT IS PROHIBITED IS VOID
 27 FOR VAGUENESS, KOLENDER V LAWSON 461 U.S. 352 (1983),
 28 SMITH V GOSUTEN 415 U.S. 566 (1974), PEOPLE V TURNER 155 C.A. 4 1432 (2007)

1 FURTHERMORE, A STATUTE, (OR TERM AND CONDITION
 2 OF PROBATION), THAT EITHER FORBIDS OR COMPELS THE
 3 DOING OF AN ACT MUST NOT BE SO VAGUE THAT MEN
 4 OF COMMON INTELLIGENCE MUST NECESSARILY GUESS
 5 AT ITS MEANING AND/OR DIFFER AS TO ITS APPLI-
 6 CATION. IN THE PRESENT PETITION, PETITIONER IS
 7 CHALLENGING THE CONSTITUTIONAL VALIDITY OF THE
 8 TERM AND CONDITION OF HIS PROBATION, I.E., "NO
 9 LETTERS TO VICTIM'S EMPLOYMENT."

10 AS THE AMBIGUITY OF THE CONDITION IS APPARENT
 11 ON ITS "FACE", IT IS CLEAR THAT THE REVOCATION OF
 12 THE PROBATIONARY STATUS OF PETITIONER WAS UN-
 13 CONSTITUTIONAL AND, THEREFORE, AN ARBITRARY,
 14 DISCRIMINATORY MISUSE OF JUDICIAL AUTHORITY.

15
 16 THE REVOCATION OF PETITIONER'S PROBATION
 17 WAS BASED UPON AN UNCONSTITUTIONALLY
 18 OVERLY BROAD TERM AND CONDITION OF
 19 PROBATION

20
 21 WHERE A CONDITION OF PROBATION REQUIRES A WAIVER
 22 OF PRECIOUS CONSTITUTIONAL RIGHTS, THE CONDITION
 23 MUST BE NARROWLY DRAWN; TO THE EXTENT IT IS
 24 OVERBROAD IT IS NOT REASONABLY RELATED TO THE
 25 COMPELLING STATE INTEREST IN REFORMATION AND
 26 AND REHABILITATION AND IS AN UNCONSTITUTIONAL
 27 RESTRICTION ON THE EXERCISE OF FUNDAMENTAL
 28 RIGHTS, PEOPLE V KELLER 76 P.A.3 827 (1978).

1 PEOPLE V. BORDEN 205 C.A. 1277 (1988)

2 PEOPLE V. KIDDER 225 C.A. 922 (1990)

3 PEOPLE V. GARCIA 19 C.A. 4 1049 (1993)

4 PEOPLE V. ACUNA 14 CAL. 4 1090 (1997)

5 KOLENDAR V. LAWSON 461 U.S. 352 (1983)

6

7 THE REVOCATION OF PETITIONER'S PROBATION WAS

8 PREDICATED UPON THE TERM AND CONDITION (i.e. "No

9 LETTERS TO VICTIM'S EMPLOYMENT"). ADDITIONALLY, IT

10 MUST BE NOTED THAT SAID TERM AND CONDITION WAS

11 INTERPRETED AND ENFORCED BY THE SUPERIOR COURT

12 IN SUCH A MANNER SO AS TO INCLUDE ALL CITIES AND

13 BUSINESS SITES THROUGHOUT THE ENTIRE WORLD.

14 CLEARLY, SUCH WIDESPREAD ENFORCEMENT WOULD

15 REPRESENT AN ABUSE OF JUDICIAL DISCRETION AND

16 AUTHORITY THAT EXCEEDS ALL ACCEPTABLE LEGAL

17 STANDARDS. IN RE. SHEENA K 40 CAL. 4 875 (2007),

18 PEOPLE V. TURNER 155 CAL. 4 1432 (2007)

19

20 THE REVOCATION OF PETITIONER'S PROBATION

21 WAS A VIOLATION OF THE DOCTRINE OF

22 SEPARATION OF POWERS

23

24 "THE POWERS OF STATE GOVERNMENT ARE LEGISLATIVE,

25 EXECUTIVE AND JUDICIAL. PERSONS CHARGED WITH THE EXERCISE

26 OF ONE POWER MAY NOT EXERCISE EITHER OF THE OTHERS

27 EXCEPT AS PERMITTED BY THIS CONSTITUTION."

28 CALIFORNIA CONSTITUTION, ARTICLE III, SECTION 3.

1 O'DONOGHUE V UNITED STATES 289 U.S. 516 (1933)

2 MARBURY V MADISON 1 CRANCH 137, 2 L. ED. 60 (1803)

3

4 THE PROBATIONARY STATUS OF THE PETITIONER WAS

5 REVOKED AND PERMANENTLY TERMINATED DUE TO

6 IT'S EXPOSURE OF THE CRIMINAL ACTIVITY WITHIN

7 WHICH THE COMPLAINING WITNESS HAD ENLARGED.

8 IT MUST ALSO BE NOTED THAT AT THE DATE AND

9 TIME OF THE REVOCATION OF PETITIONER'S PRO-

10 BATION, THE COURT, AS WELL AS THE OFFICE OF THE

11 DISTRICT ATTORNEY, (COUNTY OF ALAMEDA), WERE

12 IN POSSESSION OF "REAL" (I.E. PHOTOGRAPHIC),

13 EVIDENCE THAT SUBSTANTIATED PETITIONER'S

14 ALLEGATIONS REGARDING SUCH CRIMINAL ACTIVITY.

15 THE COURT, THEREFORE, EXCEEDED ITS VESTED AUTHORITY

16 TO INTERPRET THE CRIMINAL STATUTES AND AS A

17 RESULT THEREOF, ASSUMED AND EXERCISED THE POWERS

18 OF THE LEGISLATIVE AND EXECUTIVE BRANCHES OF

19 THE GOVERNMENT BY IMPLICITLY DECREEDING THAT

20 SELECTIVE LEGISLATIVE ENACTMENTS DID NOT APPLY

21 TO THE COMPLAINING WITNESS.

22

23 THE REVOCATION OF PETITIONER'S PROBATION

24 EXCEEDED THE JURISDICTIONAL AUTHORITY

25 OF THE COURT.

26

27 AN ACT IN EXCESS OF THE JURISDICTION OF THE ACTING

28 COURT IS VOID AND CANNOT BE RATIFIED BY WAIVER,

1 CONSENT OR ESTOPPEL. IN RE BERRY, 68 C2 137 (1968),
 2 FORTENBURY v SUPERIOR COURT 16 C2 405 (1940)
 3 _____
 4 ON JANUARY 13, 2004, COUNTY OF ALAMEDA, SUPERIOR
 5 COURT JUDGE, THE HONORABLE KENNETH MARK BUCK,
 6 ISSUED A "MODIFIED" PROTECTIVE ORDER IN CASE NO.
 7 144082, WHEREIN THE FOLLOWING NOTATION WAS
 8 INCLUDED:
 9 _____
 10 "THIS ORDER TAKES PRECEDENT OVER ANY CONFLICTING
 11 COURT ORDER."
 12 _____
 13 FURTHERMORE, IT MUST BE NOTED THAT THE ABOVE
 14 REFERENCED PROTECTIVE ORDER CONTAINED NO
 15 PROVISIONS THAT PROHIBITED PETITIONER FROM
 16 CONTACTING, (EITHER VERBALLY OR IN WRITING),
 17 THE EMPLOYER OF THE COMPLAINING WITNESS.
 18 THEFORE, WHEN THE PROTECTIVE STATUS OF
 19 PETITIONER WAS REVOKED AND PERMANENTLY
 20 TERMINATED ON THE BASIS OF HIS HAVING FOR-
 21 WARDED WRITTEN CORRESPONDENCES TO THE EM-
 22 PLOYER OF THE COMPLAINING WITNESS, THE COURT,
 23 IN FACT, ACTED IN EXCESS OF THE JURISDICTIONAL
 24 PERIMETERS THAT IT HAD SET FORTH WITHIN THE
 25 JANUARY 13, 2004 PROTECTIVE ORDER THAT IT,
 26 (THE ISSUING AUTHORITY), HAD MANDATED THEREIN.
 27 _____
 28 _____

1 PETITIONER WAS DENIED DUE PROCESS AND EQUAL
 2 PROTECTION OF THE LAW DUE TO THE INEFFECTIVE
 3 ASSISTANCE OF APPELLATE COUNSEL
 4
 5 DUE PROCESS REQUIRE STATES ... TO OFFER EACH
 6 APPELLANT A FAIR OPPORTUNITY TO OBTAIN AN ADJUDI-
 7 CATION ON THE MERITS OF HIS APPEAL.
 8 SMITH V. ROBBINS 528 U.S. 259, 120 S. CT. 746 (2000)
 9 STICKLAND V. WASHINGTON 466 U.S. 668 (1984)
 10 JONES V. BARNES 463 U.S. 745, 103 S. CT. 3308 (1983)
 11 GRAY V. GREER 800 F. 2d 644 (1986)
 12
 13 ON MULTIPLE OCCASIONS, PETITIONER FORWARDED
 14 LETTERS TO HIS APPELLATE COUNSEL, ROSS THOMAS, ESQ.,
 15 WHEREIN HE, (PETITIONER), EXPLICITLY LISTED THE
 16 MULTIPLE CONSTITUTIONAL DEPRIVATIONS THAT HE HAD
 17 SUFFERED DURING THE COURSE OF HIS TRIAL AND SUBSE-
 18 QUENT REVOCATION HEARING, (E.G. DUE PROCESS, EQUAL
 19 PROTECTION, RIGHT OF CONFRONTATION, RIGHT OF FREEDOM
 20 OF SPEECH, ETC.). NEVERTHELESS, APPELLATE COUNSEL
 21 FAILED TO INCLUDE SUCH ISSUES WITHIN PETITIONER'S
 22 APPELLATE BRIEF(S).
 23 AS A RESULT OF THE FAILURE BY APPELLATE COUNSEL
 24 TO ADHERE TO REASONABLE STANDARDS OF OBJECTIVITY
 25 IN THE PROPER INCLUSION OF VIABLE ISSUES WITHIN
 26 PETITIONER'S MERIT BRIEF, PETITIONER HAS NO RE-
 27 COURSE OTHER THAN TO SEEK THE ADJUDICATION OF SUCH
 28 ISSUES THROUGH HABEAS REVIEW.

1 CONCLUSION

2
3 THE ISSUES DISCUSSED ABOVE ARE, AT THE VERY LEAST,
4 DEBATABLE AMONG JURISTS OF REASON. THEREFORE, IT IS
5 RESPECTFULLY REQUESTED THAT THIS COURT GRANT A COA
6 ON THE ISSUES IDENTIFIED AT THE OUTSET OF THIS
7 APPLICATION.
8

9 DATED: AUGUST 20, 2008

10 RESPECTFULLY SUBMITTED,

11
12 Mahmud Ali Muhammad
13 PETITIONER IN DEPOSE
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